United States Court of Appeals

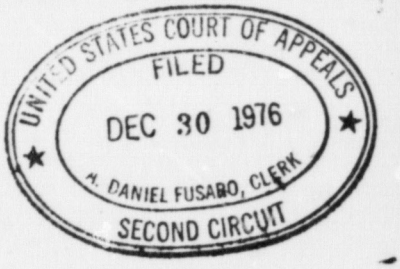
for the Second Circuit

APPENDIX

ORIGINAL

75-7462
76-7560

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs-Appellants,

-against-

LOUIS L. LEVINE, individually, and as Industrial Commissioner of the State of New York,

Defendant-Appellee.

Docket #75-7462
Docket #76-7560

B P/S

JOINT APPENDIX

On appeal from the United States District Court for the Southern District of New York

N. GEORGE TURCHIN
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253 Broadway
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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES 75 Civil 2433 RLC

DISTRICT	VS	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	$	OTHER	NUMBER	DEM.	YR.	NUMBER
[illegible]	75	2433	[illegible]	2	75	3	950	1					0858		75	2433

PLAINTIFFS

[illegible] ELECTRIC, INC. ET AL

DEFENDANTS CARTER, J.

LOUIS L. LEVINE, individually and as INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK

(SEE BACK OF THIS SHEET FOR FULL TITLE)

CAUSE

sls

Violation of 14th amendment; 28 USC 1331;
secure redress and damages by reason of defts.
disqualification of each pltf. from employing registered
~~electricians from making apprenticeship agreements, etc.~~

ATTORNEYS

Turchin and Weissberg
253 Bdwy, NCY 10038
267-3250

Louis J. Lefkowitz Atty. Gen'l
State of New York
2 World Trade Center, NYC 10047

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
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75 Civ. 2433 EXPERT ELECTRIC VS LEVINE ETC. CARTER,J. 2

DATE	NR.	PROCEEDINGS

TITLE PAGE

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC. and FIVE STAR ELECTRIC CORP.

Plaintiffs,

- against -

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

CIV. 2433 EXPERT ELECTRIC VS LOUIS LEVINE ET AL CARTER,J.
75 Civil 2433 PAGE 3 of DOCKET ENTRIES

DATE	PROCEEDINGS
05-22-75	Filed complaint and issued summons.
05-27-75	-2- Filed pltfs. OSC for TRO and prel.injunction--ORDERED that the deft. show cause in Rm.36 at 10am on May 30, 1975 why an order should not be made granting pltfs. a prel.injunction pending the determination of this action and restraining deft: Ordered that personal service of a copy of this order be made on defts by May 23,1975 at 5pm. Carter,J.
05-27-75	-3- Filed pltfs. memorandum of law in support of above OSC.
05-30-75	-4- Filed defts. affdt. and notice of motion to dismiss,etc. ret. on: May 30,1975 at 10am in Rm.36.
05-30-75	-5 Filed defts. points and authorities in support of above motion to dismiss.
06- 02-75	-6- Filed pltfs' suppl. memorandum, in support of motion for a prel. inj.
07-28-75	-7- Filed OPINION #42854...Plaintiffs motion for a prel. injunction is denied. For reasons stated herein, plaintiffs claims are devoid of merit. Defendants motion to dismiss is granted. So ordered. - Carter, J. m.n
07-30-75	-8- Filed Judgment and order that defendant have judgment against the plaintiffs dismissing the complaint. -- CLERK.
08-04-75	-9- Filed pltf's notice of appeal to the USCA for the 2nd Circuit from order dismissing the complaint. - copy mailed to L.J.Lefkowitz, Atty. Gen'l, State of NY.
08-19-75	-10- Filed notice that the original record on appeal has been certified and transmitted to the USCA for the Second Circuit this 19th day of Aug. '75.
09-11-75	11) Filed pltf's affdvt. and notice of motion for an order vacating judgment. - ret. 9-26-75
09-05-75	12) Filed true copy of USCA order that the motion made by counsel for appellant to remand the appeal herein to the US District Court for the purpose of moving in the D.C. to vacate the judgment of that court dismissing the complaint and for a re-hearing on motion previously before it and to extent the time for appellant to file a brief and joint appendix in this court to add and incl. 40 days after a decision of the motion in the district court is hereby granted. m/n
09-24-75	13) Filed memorandum of defendant in opposition to pltf's motion for an order vacating the judgment herein.
09-25-75	14) Filed plaintiff's reply memorandum.
11-06-75	=== Filed memo endorsed on document #11: Plaintiff's motion for a re-hearing is granted. So ordered. -- Carter, J.
3-9-76	Fld Order that this proceeding is stayed pending the determination by the NY STATE courrts ofthe above mentioned Article 78 proceedings .....etc....Carter,J mn
5-7-76	Fld transcript of record of proceedings, dated 3-1-76
6-29-76	Fld Deft's Notice of motion to dismiss complt &/or summ judg.ret 7-2-76-10AM Rm318
6-29-76	Fld Deft's Memo of Law " " " etc.
7-1-76	Fld Pltffs' Statement pur to Rule 9(g)
7-1-76	Fld Pltffs' affdvt by M. Weissberg in opposition to deft's motion to dismiss.
7-1-76	Fld Pltffs' Memo in Opposition to deft's motion to dismiss.
11-8-76	Fld Opinion#45343...Accordingly, the matter res judicata and deft's motion to dis is granted....It is so Ordered....Carter,J. mn
11-11-76	Fld Judgment...Ordered that deft L.L. Levine, ind. and as Industrial Comm. of the State of NY have judgment against pltffs. Expert Electric Co., I c., Eugene Iovin Inc., Phase 11 Elcetric Corp., Tap Electrical Services and Contracting, Inc., Raymor Electric Corp., R. J. Vensk, Inc., Bisantz Electric Co., Inc., R. L. Burde Electrical Contractical Contractor Inc., and Five Star Electric Corp., dismissing the complt.....R. F. Burghardt, Clerk. mn

Continued on page #4

75 Civil 2433

DATE	PROCEEDINGS
11-8-7	Fld Pltffs' Notice of Appeal to USCA frm judgment ent 11-11-76- copy of notice mailed on 11-16-76 to:L. J. Lefkowitz NYS Atty Gen.
11-22-76	Fld Pltff's affdvt by M. Leissberg in support of pltff's' application for a stay of administrative order....etc...
11-22-76	Fld Mem. and on bk of affdvt fld 1122=Denied in all respects..So Ordered. Carter,J. mn

NOTICE OF APPEAL, DATED AUGUST 4, 1975
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL B. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs,

-against-

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

- x

75 Civil 2433 RLC

NOTICE OF APPEAL TO COURT OF APPEALS

Notice is hereby given that the above named plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered on the docket on July 28, 1975, which dismissed the complaint, and denied plaintiffs' motion for a preliminary injunction.

Dated: August 4, 1975.

N. GEORGE TURCHIN
MORRIS WEISSBERG
Attorneys for Plaintiffs-Appellants
253 Broadway
New York, N.Y. 10007
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By Morris Weissberg
Morris Weissberg

To:
Hon. Louis J. Lefkowitz
Attorney General, State of New York
Attorney for Defendant-Appellee
#2 World Trade Center
New York, N.Y. 10047

Clerk
U.S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL B. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP., Plaintiffs,	75 Civil 2433 RLC NOTICE OF APPEAL TO COURT OF APPEALS
-against-	
LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York, Defendant.	

Notice is hereby given that the above named plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment entered on the docket on November 11, 1976, and from the order entered on November 8, 1976, which dismissed the complaint, and denied plaintiffs' motion for a preliminary injunction.

Dated: November 15, 1976

N. GEORGE TURCHIN
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Attorneys for Plaintiffs-Appellants
253 Broadway
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(212) 267-3250

By: _____
Morris Weissberg

TO:
HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for Defendant-Appellee
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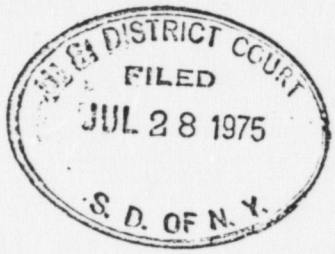
New York, N.Y. 10047

Clerk
U.S. District Court

Copy.

ORDER APPEALED FROM: MEMORANDUM #42854, 7.24.75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

#42854

Plaintiffs,

75 Civ. 2433

- against -

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

- x

A P P E A R A N C E S:

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N. George Turchin, Esq.
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Attorneys for Plaintiffs

Hon. Louis J. Lefkowitz
Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047
by Dominick J. Tuminaro, Esq.
Assistant Attorney General
Attorneys for Defendant

CARTER, District Judge

O P I N I O N

Plaintiffs, members of the United Construction Contractors Association, Inc. ("United"), by order to show cause, have moved to enjoin defendant Industrial Commissioner of New York from cancelling the registration of apprentice electricians employed by plaintiffs and from disqualifying each plaintiff from employing registered apprentice electricians for a three-year period. A hearing was held on May 30, 1975, at which time the plaintiffs were afforded the opportunity to present evidentiary proof of their factual contentions but declined to do so preferring to stand on their position that their constitutional rights had been violated per se by plaintiffs being disqualified from participation in the state apprentice program without being found personally to have violated the requirements of the state Department of Labor. Defendant has moved pursuant to Rule 12(b)(1) and (6), F.R.Civ.P., to dismiss the action.

Background Facts

Plaintiffs are electrical contractors and members of United, a New York membership corporation which conducts collective bargaining negotiations and

enters into collective bargaining agreements on behalf of its members with Local 363, International Brotherhood of Teamsters ("Local 363"). The local is comprised of journeymen and apprentice electricians.

United and Local 363 formed the Joint Apprenticeship Committee ("JAC") to sponsor an apprenticeship training program, see Article 23 (Apprenticeship Training) of New York's Labor Law, and filed a Master Agreement, pursuant to §§811(1)(d) and 220(3)(e) of the Labor Law [1], with the State Department of Labor on or about December 1, 1971. Unter the terms of the Master Agreement and Labor Law §§811, 812 and 815 (McKinney's 1965), the registered apprentices were to receive on-the-job training in the processes of the electrician's

---

[1] §811(1)(d) empowers the Industrial Commissioner "to register approved apprenticeship agreements, and upon performance thereof, to issue certificates of completion of apprenticeship." Labor Law, §811(1)(d) (McKinney's 1965). §220(3)(e) provides that "[a]pprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor." Labor Law, §220(3)(e) (McKinney's Supp. 1974).

trade according to a schedule of work processes contained in the Master Agreement. The apprentices were also to receive 144 hours of related and supplemental classroom instruction. Master Agreement, Appendix B; Labor Law, §815(3).

On June 17, 1974, defendant Industrial commissioner, pursuant to 12 N.Y.C.R.R. 601.7, served a notice of proposed deregistration of the apprenticeship agreement and program upon JAC, Local 363, and United. The notice set forth certain allegations by the Department of Labor, summarized by the Commissioner as follows:

> "1. The Joint Apprenticeship Committee sponsor allegedly failed to complete the training of apprentices as provided under the standards contained in Article 23 of the Labor Law and under the terms and conditions of the Master Agreement entered into by the Joint Apprenticeship Committee.
>
> "2. Some of the employers who were participants in the J.A.C. allegedly failed to pay prevailing wages or used apprentices in excess of the proper ratio for electricians in the locality.
>
> "3. That long after the violations and shortcomings of the program were originally made known to the sponsor in June of 1973, the sponsor allegedly failed to correct the violations and to comply with the rules and regulations in their own Master Agreement. These allegations resulted from a survey initiated by the Department in March of 1974, which purported to show that the apprentices were not receiving proper related instruction and that the participating employers were still using excessive apprentices."
>
> Order and Determintion of the Industrial Commissioner, at 1-2.

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Upon request of JAC, United and Local 363, five hearings were thereafter held, and the three respondents were all represented by separate counsel at these hearings. The recommendations of the hearing panel were reviewed and subsequently sustained by the Commissioner, who found:

> "1. From the inception of the program in 1961 until 1973, not one of the 574 apprentices achieved completion of the program or certifiable journeyman status.
>
> "2. The sponsor not only failed to meet its obligations to provide related classroom instruction but by its own actions made it impossible for any apprentice to obtain the necessary 144 hours of related classroom instruction.
>
> "3. The sponsor in a Joint Apprenticeship Committee consists of the union and each contractor having a collective bargaining agreement with said union. Therefore the act of each participating contractor in an apprenticeship program is attributable to the sponsor.
>
> "4. The sponsor failed to take any substantial corrective action with respect to violations of the Labor Law despite the fact that such violations were matters of public record.
>
> "5. The record indicates that the sponsor, after agreeing to correct deficiencies in the program, failed to do so." Id. at 7.

Following the provisions of 12 NYCRR 601.7 (c)(4), 601.8, [2] the Commissioner cancelled the registration of apprentice electricians employed by plaintiffs, and, for a period not to exceed three years, disqualified them from both employing registered apprentices and from registering any apprenticeship agreement or training program in their individual names as employers.

---

[2] 12 NYCRR 601.7 (c)(4) states:

"(c) Procedure for formal deregistration

"(4) In each case in which deregistration is ordered, the commissioner shall publish promptly in newspapers of general circulation a notice of the order and shall notify the registrant. In addition, the commissioner shall promptly notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of his individual registration; and that the deregistration removes the apprentice from coverage for State purposes."

12 NYCRR 601.8 provides:

"Restatement of program registration. Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed three years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period."

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Contentions of the Parties

Plaintiffs base their motion for a preliminary injunction on three grounds: (1) that they were denied due process of law mandated by the Fourteenth Amendment, because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in; (2) that they were denied due process of law because they were not provided with notice and an opportunity to be heard, as individual employers, on the proposed deregistration, and (3) that they were denied equal protection of the laws as guaranteed by the Fourteenth Amendment, because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program which allegedly produced complaints of Article 23 violations. Because they now have to pay all workers full wages instead of lower apprentice wages, plaintiffs claim irreparable harm resulting from their inability to bid competitively for public contracts.

Defendant seeks dismissal of the complaint on the grounds that the court lacks subject-matter jurisdiction over the action and that the complaint fails to state a claim upon which relief can be granted.

Discussion

Plaintiffs' initial contention is that they cannot be held legally responsible for acts by JAC, United, Local 363, or by any employers other than plaintiffs which violated the Master Agreement or the standards of Article 23.

JAC, the program's sponsor, was formed pursuant to the agreement by Local 363 and United. The latter, of which all plaintiffs are members, represents the employers in negotiations and agreements with the union; when United added its signature to the Master Agreement it did so on behalf of its members. This was the only agreement on the table; the Commissioner, in registering the program, entered into a contract with United and JAC, not with plaintiffs individually. Plaintiffs enjoyed the benefits of the program through their membership in the signatories; they therefore cannot complain when the Commissioner terminates these benefits when he finds the signatories to be in violation of the terms and spirit of the Master Agreement and Article 23.

Moreover, Labor Law §817 states:

> "The provisions of this article [Article 23] shall apply to a person, firm, corporation or craft only after such person, firm, corporation or craft has voluntarily elected to conform with its provisions."

The regulations enacted pursuant to Article 23 clearly indicate that the sponsor of the training program, including the joint apprenticeship committee, acts as agent for participating employers. See 12 NYCRR 601.3(b), (c) and (e). The Master Agreement commits participating employers or the apprenticeship committee acting as agent for the employers to evaluate periodically the apprentice's progress, both in job performance and related instruction, and to maintain appropriate records. This obligation is a prerequisite for the registration of the program. See 12 NYCRR 601.5(c)(6). The Master Agreement requires 144 hours of related instruction for each apprentice; this too, is a condition of registration. See Labor Law, §812; 12 NYCRR 601.5 (c)(4).

Plaintiffs have not alleged that they unwittingly became participating employers, or were forced to employ apprenticeship labor at lower wages. In fact, the regulations explicitly provide that no apprenticeship program or agreement shall be eligible for registration unless the Commissioner finds that " ... in the case of a Joint Apprenticeship Committee the participating employers have agreed to register all of the apprentices in their employ." 12 NYCRR 601.4 (a)(4).

By voluntarily participating plaintiffs agreed to the terms and regulations of Article 23, including 12 NYCRR 601.8; supra n.2. Plaintiffs cannot have it both ways. It is fundamentally disingenuous for these plaintiffs, who have reaped the benefits of the apprenticeship program, now to argue that they are free from the statutory and regulatory commitments and restrictions which the Master Agreement bound the participants to observe and fr[illegible] the consequences of failing to do so.

Plaintiffs argue, nonetheless, that mere membership in an association does not create liability in the members for the acts of the association. In Phelps Dodge Refining Corp. v. FTC, 139 F. 2d 393, 396-97 (2d Cir. 1943), a seminal case concerning the liability of members for acts of their association, the court stated:

> "Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put. "

The Second Circuit found in Phelps Dodge that the receipt by a member of certain price and dealer lists mailed by its trade association was enough from which to infer that the member learned of the association's illegal activities, or "at least it should put a member of a trade association upon inquiry and charge him with knowledge of what an inquiry would have disclosed as to his association's activities." Id. at 396.

Every participating employer in a Joint Apprenticeship Committee forms an integral part of the sponsor and is responsible for seeing that its apprentices are trained in accordance with the provisions of the Master Agreement. It is simply incredible for plaintiffs to contend that they were unaware of the massive violations which the hearing panel found and the Commission endorsed. The fact that not one of the 574 apprentices achieved completion of the training program during a span of a dozen years, and that not one completed 144 hours of required related instruction, should have put each participating employer upon inquiry notice that the sponsor and participating employers were not fulfilling their obligations under the program. Plaintiffs' failure to dissociate themselves from the sponsor is thus a ratification of the condemned activities. 139 F. 2d at 396. Plaintiffs' first due process contention is devoid of merit.

Plaintiffs' second due process assertion--that they were denied procedural due process since the notice of proposed deregistration did not name plaintiffs individually--requires no extended reply. In order to pass constitutional muster, the

> "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "Due Process," however, "is not a rigid and inflexible formula , but is an elusive concept which varies according to the factual context." Hudson Tire Mart, Inc. v. Aetna Casualty and Surety Co., No. 75-7067, at 4453 (2d Cir. June 27, 1975).

As noted earlier, insofar as the apprenticeship program was concerned, both United and JAC represented the interests of participating employers. Cf. United States v. Local 638, Enterprise Association of Steam, 360 F. Supp. 979, 995 (S.D.N.Y. 1973), modified on other grounds, 501 F. 2d 622 (2d Cir. 1974). The notice of proposed deregistration was served on both United and JAC; additionally all plaintiffs received

copies of that notice on the same day. A hearing was requested, notice of the hearing was sent to United and JAC, and both entities were represented there by counsel; in fact, the same counsel represent plaintiffs in this action. One of the plaintiffs in this action, Eugene Iovine, Inc., appeared and testified at one of the hearings. Plaintiffs, then, as members of United and as participating employers in the JAC, received actual and constructive notice of the proposed deregistration, and were not denied any opportunity to be heard.

Plaintiffs' final point--that they suffered an invidious discrimination in violation of the Equal Protection Clause--similarly deserves short shrift. The complaint alleges that at the hearings on the deregistration, the Department of Labor produced records of over 200 violations of apprenticeship agreements and regulations by competing contractor associations and rival labor unions. Plaintiffs claim that the Commissioner's failure to invoke corrective procedures against these groups constitutes an equal protection violation. Yet, when given the opportunity to support this claim with some modicum of proof, plaintiffs refused. The court, confronted with bare allegations which neither set out the nature of the purported violations, nor the specification of inaction by the Commissioner, is

thus constrained to conclude that there is no substance to the equal protection claim.

Further, since no "suspect" classification or fundamental interest is here involved, the alleged selective application of deregistration by the Commissioner must be tested under the less rigorous "traditional" equal protection analysis; that is, it must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate government interest. Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by it are imperfect." Dandridge v. Williams, 397 U.S. 471, 485 (1970). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge, supra, 397 U.S. at 486-87. Neither the complaint nor plaintiffs' accompanying affidavits set forth the nature of the alleged violations of the rival associations and locals. For all this court knows, those alleged viola-

tions may concern an aspect of apprenticeship programs entirely different from the regulatory problem which caused the Commissioner to deregister the program in the instant case. The state's legitimate interest in "insur[ing] that apprenticeship training programs [which are] developed and registered ... are of the highest possible quality in all respects of on-the-job training and related instruction and that all apprentice training programs provide meaningful employment and relevant training for all apprentices," 12 NYCRR 601.1, more than justifies the deregistration decision here. Plaintiffs have asserted no facts which even suggest an inference of arbitrary discrimination, see McGowan, supra, 366 U.S. at 426; this third contention also rests on pillars of air.

The law in this Circuit is that a preliminary injunction will issue upon "the demonstration of probable success on the merits and irreparable harm if the relief is not granted," 414 Theater Corp. v. Murphy, 499 F. 2d 1155, 1159 (2d Cir. 1974), or plaintiff must raise sufficiently serious questions going to the merits to make them a fair ground for litigation and establish that the balance of hardship tips decidedly in his favor. Gulf & Western v. Great Atlantic & Pacific Tea Co., 476 F. 2d 687 (2d Cir. 1973). Plaintiffs have met neither yardstick. Accordingly, the motion for preliminary injunction must be denied.

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Turning to defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, [3] plaintiffs, as the parties asserting jurisdiction, have the burden of proving all jurisdictional facts, Trinanes v. Schulte, 311 F. Supp. 812, 813 (S.D.N.Y. 1970). Since jurisdiction over the action is invoked under 28 U.S.C. §1331--federal question jurisdiction--plaintiffs must show that the alleged federal claims are substantial, i.e., not obviously frivolous. Hagans v. Lavine, 415 U.S. 528, 536-37 (1974). "The requirement of substantiality does not refer to the value of the interests that are at stake but to whether there is any legal substance to the position the plaintiff is presenting." Wright-Miller-Cooper, Federal Practice and Procedure; Jurisdiction §3564, at 426 (1975)

At the hearing on the preliminary injunction, plaintiffs were presented with the opportunity to offer evidentiary proof buttressing the three contentions. They chose not to do so, instead deciding to rest their case on the constitutional assertions raised in the complaint. It is plain from the complaint that plaintiffs have been denied neither due process nor equal protection

of the laws, and accordingly, their claims are devoid of merit. Defendant's motion to dismiss is granted.

SO ORDERED.

Dated: New York, New York
July 24, 1975

ROBERT L. CARTER
U.S.D.J.

ORDER APPEALED FROM: MEMORANDUM #45343, 11.5.76 24

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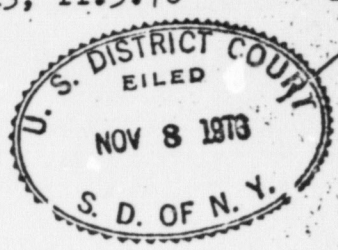

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs,

- against -

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

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75 Civ. 2433

#45343

A P P E A R A N C E S:

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CARTER, District Judge

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O P I N I O N

Plaintiffs, members of the United Construction Contractors Association, Inc. ("United") and the Joint Apprenticeship Committee ("JAC"), have moved pursuant to Rule 60(b), F.R.Civ.P., to vacate the judgment of July 24, 1975 entered in this court. A rehearing of plaintiffs' motion for a preliminary injunction is also requested.

Defendant has moved to dismiss the complaint pursuant to Rule 12(b), F.R.Civ.P., or in the alternative for summary judgment pursuant to Rule 56, F.R.Civ.P.

Background

A hearing was held on March 3, 1976, at which this court stayed the proceeding pending determination by New York state courts of a proceeding captioned, In the Matter of United Construction Contractors Association, Inc., et al. v. Louis L. Levine, as Industrial Commissioner, 52 App. Div. 2d 371 (3d Dept. 1976). After having the Article 78 proceeding transferred to the New York State Supreme Court, Appellate Division, Third Judicial Department by the State Supreme Court, Special Term, the determination of the Industrial Commissioner of the State of New York to deregister the joint apprenticeship training program between United and Local 363, International Brotherhood of Teamsters ("Local 363") was confirmed.

Contention of the Parties

Plaintiffs based their original motion for a preliminary injunction on three grounds: (1) that they were denied due process of law because they were not provided with notice and an opportunity to be heard, as individual employers, on the proposed deregistration, (2) that they were denied equal protection of the law as guaranteed by the Fourteenth Amendment, because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program which allegedly produced complaints of Article 23 violations, and (3) that they were denied due process of law mandated by the Fourteenth Amendment, because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in.

Defendant seeks dismissal of the complaint on the grounds that this court lacks jurisdiction over the subject matter of the complaint, that plaintiffs fail to state a claim upon which relief can be granted, and that the decision of the New York State Supreme Court, Appellate Division, Third Judicial Department, In the Matter of United Construction Contractors Association, Inc., et al. v. Louis L. Levine, as Industrial Commissioner, supra, is res judicata.

Discussion

For the reasons that follow, defendant's motion to dismiss is granted.

With respect to plaintiff's first claim, it is apparent that notice of the proposed deregistration was served on both United and JAC, the named parties in the deregistration hearing. Insofar as both United and JAC represented the interests of participating employers in the apprenticeship program, it is apparent that they were acting on behalf of the plaintiffs' interests at the deregistration hearings. Therefore, notice to United and JAC was sufficient and the individual members of these organizations were not entitled to notice. See Rosenfeld v. Black, 336 F. Supp. 84, 92 (E.D.N.Y. 1972). Moreover, the individual employers did in fact receive actual notice since they were sent copies of the notice given to United and JAC. Accordingly, the contention that plaintiffs' due process rights were violated is without merit. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Hudson Tire Mart, Inc. v. Aetna Casualty and Surety Co., 518 F.2d 671, 673 (2d Cir. 1975). The decision In the Matter of United Construction Contractors Association, Inc., et al. v. Louis L. Levine, as Industrial Commissioner, supra, is res judicata as to plaintiffs' second and third contentions.

Before a prior decision can be held to be res judicata in a subsequent suit, it must be determined that the second suit is between the same parties and based upon the same causes of action. McNellis v. First Federal Savings and Loan Association of Rochester, New York, 364 F. 2d 251, 254 (2d Cir.), cert. denied, 385 U.S. 970 (1966). See also, Raitport v. Commercial Bank Located Within This District As A Class, 391 F. Supp. 584, 586 (S.D.N.Y. 1975); and United States v. General Electric Company, 358 F. Supp. 731, 738 (S.D.N.Y. 1973). It is clear that in the suit before this court there is both substantial identity of parties and the same causes of action as existed in the state court. Certainly there is an identity of parties in that the defendant is the same and the plaintiffs' interests are the same as existed in the state court suit. As noted earlier, both United and JAC represented the interests of plaintiffs in the deregistration hearing and the subsequent Article 78 proceeding in the state courts. As long as plaintiffs' interests were represented at the above proceeding by one having authority to represent him, they are bound by the judgment, although they were not formally a party to the litigation. Kersh Lake District v. Johnson, 309 U.S. 485 (1940); Chicago, Rock Island & Pacific Railway Company v. Schendel, 270 U.S. 611 (1926); Ma Chuck Moon v. Dulles, 237 F.2d 241, 243 (9th Cir. 1956) cert. denied, 352 U.S. 1002 (1957); Bruszewski v. United States, 181 F. 2d 419, 423 (3rd Cir.) (concurring opinion), cert. denied, 340 U.S. 865 (1950); and Battle v. Cherry, 339 F. Supp. 186, 192 (N.D. Ga. 1972). Moreover,

plaintiffs' claim that they were denied due process because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in, was alleged in the 12th paragraph of the state court petition, and rejected by the court when it stated that "[t]he administrative determination to adopt regulation section 601.7(c) has reasonable basis in law and must be sustained... ." In the Matter of United Construction, Inc., et al. v. Louis L. Levine, as Industrial Commissioner, supra at 374. Also, plaintiffs' claim, that they were denied equal protection because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program, was alleged in the 29th paragraph of the state court petition and rejected when the court stated that: "[t]he record does not sustain the petitioners' claim that respondent discriminated against petitioners in the cancellation of their agreement." Id. at 375. I am compelled, therefore, to hold that the causes of action alleged here are the same as presented and adjudicated in state court. Herendeen v. Champion Intern. Corp., 525 F. 2d 130, 133 (2d Cir. 1975). Accordingly, the matter is res judicata and defendant's motion to dismiss is granted.

IT IS SO ORDERED.

Dated: New York, New York
November 5, 1976

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC. and FIVE STAR ELECTRIC CORP.

JURY TRIAL DEMANDED

Plaintiffs,

- against -

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

- -X

For their complaint, the plaintiffs, respectfully allege:

FIRST CLAIM FOR RELIEF

1. This action arises under the Constitution of the United States, and it is brought to secure redress and damages by reason of defendant's violations of each plaintiff's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act, 42 U.S.C. Section 1983. Jurisdiction of this Court is based upon 28 U.S.C. Sections 1331 and 1343(3) and 1343(4). The amount in controversy, exclusive of interest and costs, exceeds TEN THOUSAND ($10,000.00) DOLLARS for each plaintiff. The venue of this action is properly within this judicial district based on defendant's maintaining an office at #Two World Trade Center in the County of New York, within the Southern District of New York, and defendant transacts business at such office and elsewhere within the Southern District of New York.

2. Each plaintiff is in business as an electrical contractor, doing alteration and repair electrical work under contracts with commercial firms in private industry, and also under contracts with agencies of the Federal, New York State and New York City governments. Such governmental contract work constitutes a very substantial part of the business of each plaintiff herein, and the amount thereof exceeds TEN THOUSAND ($10,000.00) DOLLARS per annum for each plaintiff.

3. Each plaintiff is a member of the United Construction Contractors Association, Inc. (hereinafter referred to as "UNITED"), which is a New York membership corporation which conducts collective bargaining negotiations and makes collective bargaining agreements on behalf of its members with Local Union #363, International Brotherhood of Teamsters ("Local 363"), whose members include journeymen electricians and apprentice electricians. The plaintiffs are all members of UNITED.

4. UNITED and Local 363 formed a Joint Apprenticeship Committee ("JAC"), which signed and filed in the New York State Labor Department on or about December 1, 1971, an apprenticeship agreement for the employment and training of apprentices in the trade of electrician (jobbing and alterations), a copy of which is annexed hereto as Exhibit 1 and made a part hereof.

5. Section 811(d) of the New York Labor Law empowers the New York State Labor Department to register apprenticeship agreements; and Section 220(3)(e) of the New York Labor Law empowers that Department to register individuals as apprentices.

6. Each plaintiff now employs one or more apprentice electricians who is registered as an apprentice electrician with the New York State Labor Department, pursuant to Section 220(3)(e) and Article 23 of the New York Labor Law.

7. On or about June 17, 1974, the defendant caused to be served upon UNITED, Local 363 and JAC a notice of proposed deregistration of the aforesaid apprenticeship agreement and apprenticeship program, a copy of which is annexed hereto as Exhibit 2 and made a part hereof.

8. Thereafter the defendant caused hearings to be conducted upon the aforesaid notice of proposed deregistration, after which the respondent made a determination, dated May 1, 1975:

> "that the Apprenticeship Training Program of the United Construction Contractors Association, Inc. and Local #363 International Brotherhood of Teamsters, Joint Apprenticeship Committee is hereby deregistered, effective immediately."

A copy of said determination is annexed hereto as Exhibit 3 and made a part hereof.

9. The aforesaid allegations and determination that UNITED, Local 363 and JAC, committeed acts which violated regulations governing employment of registered apprentices are contrary to the facts, and the parties to said apprenticeship agreement are commencing suit to review and to anul the said determination.

10. Section 601.7(c)(4) of Regulations Governing the Registration of Apprenticeship Programs and Agreements, adopted by the New York State Labor Department, as amended June 3, 1974, provides:

> "In each case in which deregistration is ordered, the Commissioner shall publish promptly in the state bulletin a notice of the order and shall notify the registrant. In addition, the Commissioner shall promptly notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of his individual registration; and that the deregistration removes the apprentice from coverage for State purposes."

11. Section 601.8 of the said Regulations provides:

> "Reinstatement of program registration. Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed 3 years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period." (Emphasis supplied)

12. Advertisements for bids on proposed public work contracts issued by New York State and New York City governmental agencies require prospective bidders to comply with applicable apprentice training laws and regulations, such as Section 220(e) of the New York Labor Law and Section 296 of the New York Executive Law, which prohibits discrimination in employment upon public works, and Article 23 of the New York Labor Law relating to apprentice training, including Regulations 12 NYCRR Part 600, issued by the New York State Labor Department, entitled "Equal Employment Opportunity in Apprenticeship Training", by employing apprentices without discrimination and providing equal employment opportunities for apprentices, including a "Program of Affirmative Action" to provide equal employment opportunity in apprentice training.

13. Pursuant to Sections 601.7(c)(4) and 601.8 of the said Regulations, upon the making of his determination of May 1, 1975, deregistering the apprentice training program of UNITED, Local 363, JAC, the defendant immediately automatically disqualified each plaintiff for three years: from employing registered apprentices; from making apprenticeship agreements with persons whom plaintiffs employ as apprentice electricians; and from registering with the New York State Labor Department apprenticeship agreements or an apprentice training program in their individual names as employers.

14. Among other things, defendant's aforesaid actions had the effect of making each plaintiff not qualified to bid for public contracts with Federal, New York State and New York City agencies, by making each plaintiff not qualified to employ registered apprentice electricians.

15. After May 1, 1975, each plaintiff applied to defendant to register an apprentice training program or agreement in his individual name as employer, but defendant has taken no action upon such applications.

16. None of the plaintiffs committed any of the acts alleged in the said notice of proposed deregistration (Exhibit 2 annexed), in that none of the plaintiffs failed to pay prevailing wages and supplements, employed unregistered apprentices, or used apprentices in excess of the ratio provided in the said apprenticeship agreement.

17. None of the plaintiffs agreed to, authorized or ratified any of the acts alleged in the said notice of proposed deregistration.

18. Defendant did not serve said notice of proposed deregistration upon any of the plaintiffs; no plaintiff was a party to the said deregistration proceeding, or had any notice thereof or any opportunity to be heard with relation thereto, or to present evidence and to cross-examine witnesses at a hearing relating thereto; and the defendant's aforesaid determination did not refer to any of the plaintiffs or make any determination concerning them.

19. By reason of the foregoing, the provisions of Sections 601.7(c)(4) and 601.8 of the said Regulations, that upon the making of a determination deregistering an apprentice training program, the registra-

tion of apprentices thereunder shall be canceled; and that no employer or union which participated therein shall be eligible to register any apprenticeship training program under any other name for three years, and defendant's actions thereunder following his determination of May 1, 1975 deregistering the apprentice training program of UNITED, Local 363, JAC, in automatically disqualifying each plaintiff from employing registered apprentice electricians, from making apprenticeship agreements with persons whom plaintiffs employ as apprentice electricians, and from registering with the New York State Labor Department apprenticeship agreements in their individual names as employers, were contrary to the facts, and without basis in fact, and ascribed to each plaintiff guilt by association for acts allegedly performed by other employers, or by UNITED, Local 363, JAC, and thereby the said Regulations, and defendant's actions implementing them, deprived each plaintiff of liberty and property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, consequently, the said Regulations, and defendant's actions implementing them, are unconstitutional and invalid.

20. The defendant intends to take immediate action pursuant to his aforesaid deregistration determination and pursuant to his aforesaid Regulations, to cancel the registration of each apprentice electrician employed by each plaintiff; to disqualify each plaintiff from employing registered apprentice electricians; to disqualify each plaintiff from making apprenticeship agreements with persons whom it employs as apprentice electrician; and to disqualify each plaintiff from registering with

the New York State Labor Department an apprenticeship training program or apprenticeship agreements in his individual name as employer.

21. Each plaintiff will sustain immediate irreparable harm by defendant's aforesaid impending actions which will have the effect of making each plaintiff incapable of complying with Federal, New York State and New York City public contract requirements that contractors shall employ apprentices, and that they shall provide a program of affirmative action which gives equal employment opportunity for apprentice training; and thereby each plaintiff will be excluded from bidding on public contracts, leaving a monopoly of opportunity to bid on such contracts to contractors who employ members of Local 3 and Local 25, International Brotherhood of Electrical Workers ("Local 3"), which is a rival labor union of Local 363, and which Local 3 made the complaint to defendant, upon which he issued the said notice of proposed deregistration and determination of deregistration of UNITED, Local 363, JAC., and defendant will require each plaintiff to pay to each apprentice electrician in its employ the prevailing wages of a journeyman electrician which are now $10.86 per hour, plus supplemental employment benefits cosing $3.20 per hour, making a total wage cost of $14.06 per hour, instead of the current prevailing applicable wage rates to first year to fourth year apprentice electricians which now range from $3.50 per hour to $5.55 per hour, plus supplemental employment benefits ranging from $1.04 per hour to $2.05 per hour, making a total wage cost between $4.54 per hour and $7.60 per hour for apprentice electricians. Each plaintiff is not able to continue in business under the aforesaid conditions newly imposed on it by defendant.

SECOND CLAIM FOR RELIEF

22. This claim for relief arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

23. Plaintiffs herein repeat each and every allegation in Paragraphs "1" through "18",and "20" and "21" hereof, as if herein set forth in full.

24. The defendant based his aforesaid notice of proposed deregistration and determination of deregistration of the apprentice training program of UNITED, Local 363, JAC, upon complaints made to him by Local 3, which is a rival labor union to Local 363.

25. At the administrative hearing upon such notice of proposed deregistration, pursuant to subpoena duces tecum, the New York State Labor Department produced reports that its inspectors fourn 230 violations of apprenticeship and Regulations agreements by contractors who employ only members of Local 3 and who are members of associations of electrical contractors which have collective bargaining contracts with Local 3.

26. Such violations by such contractors have existed for many years, without any action taken thereon by the New York State Labor Department to apply deregistration or other discipline or corrective action to the apprentice trainiⁿ program of Local 3 and the associations of electrical contractors which have collective bargaining contracts with Local 3 and Local 25.

27. Defendant's aforesaid actions in deregistering the apprentice training program of UNITED, Local 363, JAC, and in disqualifying the the plaintiffs as aforesaid, but applying no deregistration or other discipline or corrective action to contractors who employ apprentice electricians and who are members of associations which have collective bargaining contracts with Local 3 and Local 25, eliminated bidding on public contracts by plaintiffs who do not employ members of Local 3, and who are not members of associations of contractors which have collective bargaining contracts with Locl 3 and Local 25, and thereby such actions discriminated invidious-

ly against the plaintiffs and denied to the plaintiffs the equal protection of the laws, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, consequently, such actions are unconstitutional and invalid.

THIRD CLAIM FOR RELIEF

28. This claim for relief arises under the Civil Rights Act, 42 U.S.C. Section 1983.

29. Plaintiff herein repeats each and every allegation in Paragraphs 1 through "21", and "24" through "27" hereof, as if herein set forth in full.

30. Defendant's aforesaid actions have caused and will cause damages to each plaintiff consisting of loss of opportunity to bid for and to make with Federal, New York State and New York City agencies, public contracts for alteration and repair electrical work, and increased wage costs by requiring each plaintiff to pay the wage rates of journeymen electricians to apprentice electricians whom it employs, and other damages, amounting in all to not less than FIFTY THOUSAND ($50,000.00) DOLLARS damages for each plaintiff.

31. By reason of the foregoing, each plaintiff is entitled to redress of defendant's aforesaid violations of each plaintiff's Federal Constitutional rights, and to a money judgment in its favor against defendant for the damages it sustained, and for an allowance of counsel fess to plaintiffs' attorneys herein.

WHEREFORE, each plaintiff demands judgment:

1. Adjudging and declaring that the provisions of Sections 601.7(c)(4) and 601.8 of the Regulations of the New York State Labor Department that upon the making of a determination deregistering an apprentice training program no employer or union which participated therein shall be eligible to register any apprenticeship training program under any other name for three years, and defendant's actions thereunder immediately following his determination of May 1, 1975, deregistering the apprentice training program of United Construction Contractors Association, Inc., Local Union #363, International Brotherhood of Teamsters, and the Joint Apprenticeship Committee formed by the said Association and local labor union, disqualifying each plaintiff from employing registered apprentice electricians, from making apprenticeship agreements with persons whom plaintiffs employ as apprentice electricians, and from registering with the New York State Labor Department apprenticeship agreements in their individual names as employers, was contrary to the facts and without basis in fact, and it ascribed to each plaintiff guilt by association for acts alleged performed by other employers, or by the said Association and local labor union 363 and their joint apprenticeship committee, and thereby the said Regulation, and the defendant's actions implementing it, deprived each plaintiff of liberty and property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, consequently , the said Regulation, and defendant's actions implementing it, are unconstitutional and invalid.

2. Adjudging and declaring that defendant's aforesaid disqualification of each plaintiff also discriminated invidiously against each plaintiff and denied to each plaintiff the equal protection of the

laws, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and consequently, such disqualification is unconstitutional and invalid.

3. Enjoining and restraining the defendant, his agents, servants and employees preliminarily, pending the determination of this action, and permanently, from canceling the registration of apprentice electricians employed by plaintiff; from disqualifying each plaintiff from employing registered apprentice electricians; from disqualifying each plaintiff from making apprenticship agreements with persons whom they employ as apprentice electricians; and from disqualifying each plaintiff from registering with the New York State Labor Department apprenticeship agreements or an apprenticeship training program in their individual names as employers.

4. Awarding a money judgment in favor of each plaintiff against the defendant for the damages it sustained, and for an allowance of counsel fees to plaintiff's attorneys herein.

5. For such other, further or different relief as may be just and proper.

N. GEORGE TURCHIN
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(212) 267-3250

BY_____
N. GEORGE TURCHIN

EXHIBIT 1 NOTICE OF PROPOSED DEREGISTRATION

STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of the
Deregistration of the
Apprenticeship Training Program
of
United Construction Contractors Association, Inc.
and
Local #363 International Brotherhood of Teamsters,
J.A.C.
184 Fifth Avenue
New York, New York 10010

NOTICE

OF

PROPOSED

DEREGISTRATION

pursuant to Article 23 of the Labor Law and Part 601, Subchapter A, Chapter IX, of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York

SIRS:

PLEASE TAKE NOTICE that investigation by the New York State Department of Labor has disclosed information concerning your apprenticeship program which indicates that it has not been conducted in conformity with the provisions and purposes of Article 23 of the Labor Law and the regulations promulgated thereunder governing the registration of apprenticeship programs and agreements. Such information includes the following:

1. The United Construction Contractors Association, Inc., and Local #363, International Brotherhood of Teamsters Joint Apprenticeship Committee has failed to meet its responsibilities under its master Apprenticeship program in that it failed to complete the training of apprentices so as to qualify as journeymen, in contravention of the purposes of Article 23 and specifically Section 810 of said Article.

2. The following employers, members of the Joint Apprenticeship Committee have violated Article 8 of the Labor Law and the Apprenticeship Training Regulations in that they have failed to pay prevailing wages and supplements, employed unregistered apprentices, used apprentices in excess of the ratio provided in the apprenticeship agreements for the geographical area in which the work was performed:

A. Abetta Electric Service Corporation, 152-26 Northern Blvd., Flushing, New York, subcontractor for Beacon Maintenance Co., Inc., - V. C. Vitanzi Sons, a Joint Venture, - Contract Specification No. 24887-E, Brooklyn State Hospital, N.Y. - New York State Health and Mental Hygiene Facilities Improvement Corp. Failure to pay prevailing rates, failure to use apprentices in the proper ratio and failure to register an apprentice. Total underpayments due to 25 workmen $32,158.74. (Decision of Industrial Commissioner, June 20, 1973, affirmed by Appellate Division)

B. Unity Electric Co., 2386 Hempstead Turnpike, East Meadow, New York - Subcontractor for Dember Construction Co., Safety Improvement Phase 2, SUCF, Project No. 26182, State University at Farmingdale, N.Y. Failure to register certain apprentices, employed apprentices in excess of proper ratio, failed to pay prevailing rates. Total amount of underpayments due to 11 workmen $6,207.30. (Violation 5/25/73)

C. Iovine, Inc., Brookville Blvd., Rosedale, New York, prime contractor - Dept. of Public Works, County of Nassau, Contract 1227-E, Pool Complex, Phase II, Whitney Pond Park, Manhasset, N.Y. Underpayment of prevailing rates. Failure to use apprentices in the proper ratio. Total amount of underpayments due to five workmen $1,443.66. (Violation 8/11/71)

D. Hylan Electric Co., Inc., 851 Van Duzer Street, Staten Island, New York. Prime contractor - Dept. of Mental Hygiene, Sec. 24918 - CHSE alterations of connecting line for Administrative Spaces - installation for Basic Research Phase V, Richmond, N.Y. Employed three unregistered apprentices. Failure to pay prevailing rates. Total amount of underpayments due to five workmen $2,479.60. May 2, 1973 to December 28, 1973.

E. Gottlieb Contracting Co., Inc., 180-11 Jamaica Avenue, Jamaica, N.Y. A subcontractor of V. C. Vitanzi Sons on Contracts Nos. 705487, 216818 and 217261, between Board of Education of the City of New York and V. C. Vitanzi Sons. Failure to pay prevailing wages and supplements, failure to use apprentices in the proper ratio, unregistered apprentices. Total amount of underpayments due workmen $21,157.96. May 9, 1974.

F. Abetta Electric Service Corporation, 152-26 Northern Blvd., Flushing, New York, as subcontractor for V. C. Vitanzi Sons, on contracts between the Board of Education of the City of New York and V. C. Vitanzi Sons, Contracts Nos. 705089, 705024, PO43622. Failure to pay prevailing wages, failure to use apprentices in the proper ratio. Total amount of underpayments due workmen $9,725.06. May 9, 1974.

G. Franco Electric Corp., 194-07 Northern Blvd. Flushing, New York - Failure to pay prevailing wages and supplements, failure to use apprentices in proper ratio on Federal contract.

3. Information obtained from a survey of 16 participating employers by the Apprentice Training field staff begun March 11, 1974 disclosed the following violations.

   a. Participants, Brown Electric, Wickham Contracting Co., Inc., Five J. Electric Corp., Alco Electric Co., Inc., Lo Bello Electric, Inc., Realty Power, Inc., Franco Electric Corp., Eugene Iovine, Ram Electric and Electro Flo Installation, in the above-mentioned sponsor's program employed apprentices in excess of the ratio prescribed in the registered master apprentice training program.

   b Participants, Brown Electric, Wickham Contracting Co., Inc., Five J. Electric Corp., Alco Electric Co., Inc., Lo Bello Electric, Inc., Realty Power, Inc., Pennsylvania Building Co., Eugene Iovine, Ram Electric and Electro Flo Installation, in the sponsor's program did not ensure that apprentices received the requisite related instruction.

4. Participants, Hylan Electric Co., Inc., and Mansfield Electric in the sponsor's program violated Article 8 of the Labor Law in that they employed and paid persons as apprentices who were not registered as such with the New York State Department of Labor.

5. Despite numerous violations and irregularities by the various employer members of the J.A.C. and known to the J.A.C. over a period of years, the Joint Apprenticeship Committee of the United Construction Contractors Association, Inc., Local 363 International Brotherhood of Teamsters has taken no action against members violating the apprenticeship program and agreements.

EXHIBIT 2, ORDER AND DETERMINATION BY LABOR DEPT

STATE OF NEW YORK — DEPARTMENT OF LABOR

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In the Matter of the Deregistration of the Apprenticeship Training Program of United Construction Contractors Association, Inc. and Local #363 International Brotherhood of Teamsters, JAC 184 Fifth Avenue New York, New York 10010

pursuant to Article 23 of the Labor Law and Part 601, Subchapter A, Chapter IX, of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York

ORDER AND DETERMINATION

- x

This was a proceeding under Article 23 of the Labor Law and the regulations adopted pursuant thereto to deregister the apprenticeship training program of the above named sponsor.

Pursuant to my direction a panel consisting of Julius Mintz Chairman, and six other members of the Apprenticeship and Training Council heard the matter. The Chairman has submitted the unanimous recommendation of the Panel to deregister. I adopt the recommendation to deregister in accordance with my decision attached hereto.

NOW, THEREFORE, upon the entire record of this proceeding

IT IS ORDERED that the Apprenticeship Training Program of the United Construction Contractors Association, Inc. and Local #363 International Brotherhood of Teamsters, Joint Apprenticeship Committee is hereby deregistered, effective immediately.

Louis L Levine

LOUIS L. LEVINE
Industrial Commissioner

DATED: New York, New York

May 1, 1975

STATE OF NEW YORK DEPARTMENT OF LABOR

- x

In the Matter of the Deregistration of the Apprenticeship Training Program of United Construction Contractors Association, Inc. and Local #363 International Brotherhood of Teamsters, JAC 184 Fifth Avenue New York, New York 10010

pursuant to Article 23 of the Labor Law and Part 601, Subchapter A, Chapter IX, of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York

DECISION

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FACTS

Pursuant to regulations promulgated under Article 23 of the Labor Law, a notice of proposed deregistration (Department's Exhibit 2) was forwarded on June 17, 1974, to the United Contractors Association and Local #363 International Brotherhood of Teamsters, J.A.C. (hereinafter referred to as the sponsor). The notice of proposed deregistration set forth the Department's allegations, which may be summarized as follows:

1. The Joint Apprenticeship Committee sponsor allegedly failed to complete the training of apprentices as provided under the standards contained in Article 23 of the Labor Law and under the terms and conditions of the Master Agreement entered into by the Joint Apprenticeship Committee.

2. Some of the employers who were participants in the J.A.C. allegedly failed to pay prevailing wages or used apprentices in excess of the proper ratio for electricians in the locality.

3. That long after the violations and shortcomings of the program were originally made known to the sponsor in June of 1973, the sponsor allegedly failed to correct the violations and to comply with the rules and regulations in their own Master Agreement. These allegations resulted from a survey initiated by the Department in March of 1974, which purported

to show that the apprentices were not receiving proper related instruction and that the participating employers were still using excessive apprentices.

The respondents requested a hearing on the charges and in accordance with the rules and regulations governing apprenticeship, a hearing was conducted before a panel consisting of the following members of the Apprenticeship and Training Council. Jack Wilke, Alvin Richman, David Schatz, Frank Mascola, Gordon Rogers and Alsace Cragnolin. Julius Mintz acted as Chairman. The sponsor was represented by George Turchin, Esq., attorney for the United Contractors Association, Inc., by Morris Weissberg, Esq., attorney for the Joint Apprenticeship Committee of the United Construction Contractors Association and by Gutterman & Pollack, Esqs., Sanford E. Pollack, of Counsel, for Local #363 International Brotherhood of Teamsters. Representing the Department were Michael J. Femenella, Jr., Esq., Joan B. Scherb, Esq., and Abraham E. Klein, Esq.

Hearings were held on October 29, 1974, November 25, 1974, December 11, 1974, February 6, 1975 and March 7, 1975. These hearings produced some 566 pages of testimony. I have carefully reviewed the entire record in this proceeding.

THE HEARINGS

After denial of Respondents preliminary motion challenging the jurisdiction of the panel and request for information by way of subpoena the hearing began. The record indicates that the basic document in an apprenticeship program consists of the Master Apprenticeship Agreement which sets forth the obligations of the sponsor with respect to the training of apprentices. In this case the Master Agreement provides for a schedule of work processes that the apprentice is to be trained in, and outlines the on-the-job training to be given the apprentices. In addition, an outline of related instruction designed to provide the apprentice with the knowledge of the technical subjects related to his trade was attached

as part of the agreement. The related instruction covered such processes as blueprint reading, mathmatics and circuitry. The agreement also contained a progressive wage scale to be paid the apprentice in the course of his training, the ratio of apprentices to journeymen, in this case, one apprentice for every three journeymen, and a provision that upon successful completion of the on-the-job training and apprenticeship training, graduated apprentices would receive a certificate of completion (Pp. 64-66 of the minutes.) Moreover, the agreement provided specifically that 144 hours of related instruction are required for each apprentice for each year. The basic record kept by the Department for each apprentice is the so-called "601 card" which lists information for each apprentice. All information contained on the 601 card is supplied by the sponsor.

The other document kept for each apprentice is the "706 card" prepared by the Department of Labor and forwarded to the Board of Education to record the hours of related instruction for each apprentice. All information as to hours and classroom instruction is completed by the Board of Education from their records. (P. 80 of the minutes.)

Upon completion of the on-the-job training of the apprentice, the Department of Labor requests a record of attendance from the Board of Education to determine whether the apprentice has completed his classroom instruction and if so, a certificate of completion is issued to the graduate, assuring recognition of journeyman status. (P. 108 of the minutes.) The record indicates that no apprentice received a certificate of completion under this program (P. 112 of the minutes.)

The record indicates that the Supervisor of Apprentice Training, in the Metropolitan Area first became aware of a problem in the sponsor's program when he was called to testify in a hearing concerning the excessive

use of apprentices in the spring of 1973. (P. 252 of the minutes.) He further testified, that he appeared at a meeting in June, 1973 at the Commodore Hotel in New York City where charges were presented to the sponsor of the program. (P. 256 of the minutes.) As the result of this meeting he began an independent investigation of the program by requesting of the Board of Education of the City of New York, a record of the classroom attendance for every apprentice indentured under this program for the year beginning September, 1972 and ending June, 1973. He received a report of attendance (Department's Exhibit 13) and, upon receipt of this attendance record, he prepared a list of apprentices registered by the sponsor, from 601 cards, who did not attend related classroom instruction. He then met with the Secretary of the Sponsor, one, Mr. Bellantoni, and went over with him, each name on the list. Mr. Bellantoni requested that the Department remove those names that he no longer considered in the program and the names were removed from the list. (P. 284 of the minutes.) The

The Supervisor further testified (P. 310 of the minutes) that he discussed with Mr. Bellantoni the sponsor's obligation to provide related classroom instruction and he further pointed out that the school report showed that not one apprentice who attended class, attended for the 144 hours a year as required by the regulations and the Master Agreement under the program. The Board of Education, according to the witness, did set up additional classes in the spring of 1974 so that the apprentices could complete 144 hours of apprentice training. He also discussed with Mr. Bellantoni the failure of the program to properly recruit apprentices. The method of recruitment was to be continuous, providing equal opportunity for all persons to achieve apprenticeship status. The witness testified that Mr. Bellantoni told him that for the most part the apprentices were not recruited by acceptable methods but were, in fact, hired directly by participating contractors and the names then submitted to the Joint Apprenticeship Committee. Mr. Bellantoni agreed to revise this method of

recruitment to conform with the proper procedures. They also discussed the excessive use of apprentices. The witness was then asked, whether from the period of November, 1973 to April 1974 there was any substantial improvement in the following areas.

1. The percentage of apprentices receiving related classroom instruction. The answer was "No"

2. Whether new or satisfactory recruitment procedure was worked out. The answer was "No"

3. The witness was then asked how many apprentices were indentured under the program from its inception. The answer was "574". The following testimony then occurred, (P. 329 of the minutes),

THE CHAIRMAN: Out of that 574, how many, can you tell me, completed on-the-job training and their related instruction?

THE WITNESS: None.

As regards requirement for related instruction Mr. Burfeind, of the Board of Education, testified the Board of Education was providing 144 hours of instruction per year for each apprentice. However, in 1971 the hours were reduced at the request of the sponsor. Testimony is as follows: (P. 364 of the minutes)

"Q. How many hours of instruction per year would that be?

A. 108.

Q. And why did you give 108 hours per week instruction?

Mr. Pollack: Objection.

The Chairman: It wouldn't be 108 hours per week.

Mrs. Scherb: Per school year, I am sorry -- corrected.

The Chairman: Overruled.

Q. Why?

A. I can't give you the exact details unless I look at my notes, but a meeting was held with the JAC, the late Mr. Marino, Mr. Gordon, who was the president, and Mr. Gabriel, who was the educational director, was

held at the office of Local 819, where we discussed the feasibility of reducing from four hours to three hours per week, because of the fact that many of the apprentices came from distances as far as Patchogue and upstate as far as Newburgh; and for that reason, we gave serious consideration to the change. However, I instructed the JAC, Mr. Marino, Mr. Gordon, Mr. Gabriel, that before this could be done, we would have to have approval from the State Education Department. I instructed them at that time, to write to the State Labor Department for this approval of the change and they in turn would contact the State Education Department; and if such a change was feasible or practicable, they would probably receive permission.

From that date to this date, I have never heard whether it was done or not. All I know is that in the beginning, in September '71, they sent their apprentices in to Metropolitan Evening Trade School, where we had transferred this program, but they sent them in three hours per night, once a week, in order to accommodate the apprentices.

I was under the impression then, as I am now, that they had received permission from the State Department of Labor, although I had never been in contact with the State Education Department relative to this change.

Q. I assume, sir, you never received any written communication from the State Education Department agreeing to such a change?

A. I have not."

The charges alleging that individual contractors failed to pay prevailing wages and violated the acceptable ratio of apprentices were conceded by the sponsor. The sponsor stipulated that the ratio were violated by the individual contractors but contends that such violations are not attributable to the sponsor. (Pp. 507-509 of the minutes.)

The charges under Subdivision three that the sponsor failed to correct dificiencies in the program are the result of a survey initiated by the Department on March 11, 1974 indicating that certain contractors used apprentices in excess of the ratio and failed to ensure that the apprentices

received the related instruction required under the program. The Supervisor testified that in the fall of 1973, he discussed and obtained an agreement from Mr. Bellantoni to correct the deficiencies of the program. (P. 314 of the minutes.) In April, 1974 he sent an investigator to the Metropolitan Evening Trade School to obtain the names of all the registered students attending classes and interviewed a number of apprentices. The investigator's report (Department's Exhibit 10), indicated that out of some 255 apprentices registered in the program, 91 of the registered apprentices were attending classes. The survey (Department's Exhibits 8 & 9) indicated that excessive apprentices continued to be used by the contractors in violation of the Master Apprenticeship program, and that two participants used unregistered apprentices.

The respondents presented no witnesses to dispute any of the testimony given by the Department. The one witness presented, Mr. Eugene Iovine, a participating contractor, corroborated the violations against him and stated that they were committed inadvertently and through oversight.

As to the contention of the Respondents that the regulation effective December 4, 1973, and specifically the requirement contained therein providing for the ten-day corrective notice should be the governing procedure in this matter, the Department maintains that the ten-day period to correct defects in the program was not required by the regulations effective June 3, 1974, and that since the notice of proposed deregistration was dated June 17, 1974, the regulations effective June 3, 1974 were the regulations applicable to this proceeding.

Assuming arguendo that the Respondents' contention is correct, giving a ten-day corrective notice in this case would have been a futile act, since the failure to provide related instructions over a period of some 13 years could not have been remedied. Nor could the failure to observe

the proper apprenticeship ratio or to pay prevailing wages have been corrected. More persuasive to me than these technical arguments is the undisputed testimony (P. 252 of the minutes), that from June, 1973, when the sponsor was clearly aware of the charges against it, until March, 1974, no substantial corrective action was taken to remove the known deficiencies that existed in the program.

It is my determination that the regulations effective June 3, 1974, were the governing regulations in this proceeding.

FINDINGS

Based upon the whole record I find:

1. From the inception of the program in 1961 until 1973, not one of the 574 apprentices acheived completion of the program or certifiable journeyman status.

2. The sponsor not only failed to meet its obligations to provide related classroom instruction but by its own actions made it impossible for any apprentice to obtain the necessary 144 hours of related classroom instruction.

3. The sponsor in a Joint Apprenticeship Committee consists of the union and each contractor having a collective bargaining agreement with said union. Therefore the acts of each participating contractor in an apprenticeship program is attributable to the sponsor.

4. The sponsor failed to take any substantial corrective action with respect to violations of the Labor Law despite the fact that such violations were matters of public record.

5. The record indicates that the sponsor, after agreeing to correct deficiencies in the program, failed to do so.

CONCLUSION

On April 11, 1975, the Panel of the Apprenticeship and Training Council designated to conduct this hearing, submitted its recommendations to me. The members of the Panel voted unanimously to recommend that the Apprenticeship Training Program be deregistered (Panel's recommendation attached.)

The advantages granted to a sponsor of a registered Apprenticeship Training program under the New York State Labor Law are substantial and carry with it a concomitent responsibility to fully and completely train qualified journeymen. This record indicates the utter failure of the sponsor to meet its responsibility and mandates that the unanimous recommendation of the Panel be accepted. The program is deregistered.

AFFIDAVIT OF FRANK MICELOTTA, IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION 55

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC. and FIVE STAR ELECTRIC CORP.,

Plaintiffs,

- against -

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant.

- -X

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

FRANK MICELOTTA, being duly sworn, deposes and says:

1. I am the President of Expert Electric, Inc. which is one of the plaintiffs herein. I make this affidavit in support of plaintiffs' annexed motion for a temporary restraining order, and for a preliminary injunction, pending the determination of this action, restraining the defendant from cancelling the registration of apprentice electricians employed by plaintiffs; from disqualifying each plaintiff from employing registered apprentice electricians; from disqualifying each plaintiff making apprenticeship agreements with persons whom they employ as ap-

prentice electricians; and from disqualifying each plaintiff from registering with the New York State Labor Department apprenticeship agreements or an apprentice training program in their individual names as employers.

2. I have read the complaint herein. The statements therein are true to my own knowledge. Instead of repeating the allegations in the complaint, I incorporate them herein by reference, as if herein set forth in full.

3. My above named firm now employes the following person as a registered apprentice electrician: Raymond Rinaldi.

4. Defendant served a notice of proposed deregistration of an apprentice training program upon United Construction Contractors Association, Inc. ("United") of which my above-named firm is a member, and upon Local 363, International Brotherhood of Teamsters ("Local 363"), and upon a Joint Apprenticeship Committee formed by said Association and labor union ("JAC"); that hearings were held upon the allegations in the said notice of alleged violations of the apprenticeship agreement and of regulations governing apprentice training programs; and that on May 1, 1975, the defendant made a determination which sustained the said allegations, and deregistered the said apprentice training program.

5. Defendant's allegations and determination that there were violations of the said apprentice training program and applicable Regulations are contrary to the facts; and the parties to said apprentice-

ship agreement are commencing suit to review and to annul the said determination.

6. Pursuant to sections 601.7(c)(4) and 601.8 of defendant's Regulations governing apprentice training, the defendant cancelled the registration of apprentice electricians employed by plaintiff; he disqualified each plaintiff for three years from employing registered apprentices; from making apprenticeship agreements with persons whom plaintiffs employ as apprentice electricians; and from registering with the New York State Labor Department apprenticeship agreements or an apprentice training program in their individual names as employers.

7. After May 1, 1975, my above-named form applied to defendant to register an apprentice training program or agreement in its individual name as employer, and to register its above-named employees as apprentice electricians but defendant has taken no action upon such application.

8. My above-named firm did not commit any of the acts alleged in the notice of proposed deregistration, in that it did not fail to pay prevailing wages and supplements, or employ unregistered apprentices, or use apprentices in excess of the ratio provided in the apprenticeship agreement.

9. My above-named firm did not agree to, authorize or ratify any of the acts alleged in the said notice of proposed deregistration.

10. Defendant did not serve said notice of proposed deregistration upon my above-named firm, which was not a party to the deregistration proceeding, it had no notice thereof and no opportunity to be heard with relation thereto, or to present evidence and to cross-examine witnesses at a hearing relating thereto, and defendant's determination did not refer to my firm or make any determination concerning my firm.

11. For the foregoing reasons, I submit that the provisions of sections 601.7(c)(4) and 601.8 of the said Regulations that no employer who participated in a deregistered apprentice training program shall be eligible for three years to register any apprentice training program under any other name, and defendant's actions implementing such Regulations following his determination of May 1, 1975 deregistering the said apprentice training program by cancelling the registration of each apprentice electrician employed by plaintiffs; by disqualifying each plaintiff from employing registered apprentice electricians; making apprenticeship agreements with persons whom plaintiffs employ as apprentice electricians; and registering with the New York State Labor Department apprenticeship agreements in their individual names as employers; were contrary to the facts, and without basis in fact, and ascribed to each plaintiff guilt by association for acts allegedly performed by other employers, or by United, Local 363, JAC, and thereby the said Regulations, and defendant's actions implementing them, deprived each plaintiff of liberty and property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitu-

tion of the United States, and, consequently, the said Regulations, and defendant's actions implementing them, are unconstitutional and invalid.

12. Defendant based his notice of proposed deregistration and his determination of deregistration of the apprentice training program of United, Local 363, JAC, upon complaints made to him by Local Union No. 3 and Local Union No. 25, International Brotherhood of Electrical Workers, which is a rival labor union to Local 363.

13. At the administrative hearing upon such proposed deregistration, pursuant to subpoena duces tecum the New York State Labor Department produced reports that its inspectors found 230 violations of apprenticeship agreements and Regulations by contractors who employ only members of Local 3 and Local 25, and who are members of associations of contractors which have collective bargaining contracts with Local 3 and Local 25.

14. Such violations by such contractors have existed for many years, without any action taken thereon by the New York State Labor Department to apply deregistration or other discipline or corrective action to the apprentice training program of Local 3 and Local 25 and the associations of electrical contractors which have collective bargaining contracts with Local 3 and Local 25.

15. Defendant's actions in deregistering the apprentice training program of United, Local 363, JAC, upon the allegations in the notice of proposed deregistration, without deregistering or imposing

other discipline or corrective action upon contractors who are members of associations which have collective bargaining contracts with Local 3 and Local 25, for their aforesaid 230 violations of apprentice training agreements and Regulations, disqualified from bidding on public contracts the plaintiffs who do not employ members of Local 3 and Local 25, without affecting plaintiffs' competitors who do employ members of Local 3 and Local 25, and thereby such actions discriminated invidiviously against the plaintiffs and denied to the plaintiffs the equal protection of the laws, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and, consequently, such actions are unconstitutional and invalid.

16. Each plaintiff will sustain immediate irreparable harm by defendant's immediately impending actions, pursuant to his doregistration determination, and pursuant to the aforesaid Regulations: cancelling the registration of each apprentice electrician employed by each plaintiff: disqualifying each plaintiff from employing registered apprentice electricians; disqualifying each plaintiff from making apprenticeship agreements with persons whom it employs as apprentice electrician; and disqualifying each plaintiff from registering with the New York State Labor Department an apprentice training program or apprenticeship agreements in his individual name as employer.

17. Each plaintiff will also sustain immediately irreparable harm by the said disqualifications which made each plaintiff incapable of complying with Federal, New York State public contract and New York

City requirements that contractors shall employ apprentices, and that they shall provide a program of affirmative action which gives equal employment opportunity for apprentice training; and thereby each plaintiff is excluded from bidding on public contracts, leaving a monopoly of opportunity to bid on such contracts to contractors who employ members of Local 3 and Local 25.

18. An order to show cause is requested herein, instead of the usual notice of motion, because the plaintiffs hereby make application for a temporary restraining order, and to bring on for hearing as soon as possible their annexed motion for a preliminary injunction.

19. No previous application has been made for the annexed order to show cause.

Sworn to before me this
15th day of May, 1975

Frank Micelotta

The defendant moves the Court as follows:

1. To dismiss the action on the ground that the complaint shows on its face that the Court lacks jurisdiction since the alleged Federal questions are frivolous and unsubstantial in that (a) each plaintiff is a member of the United Construction Contractors Association, Inc., and "JAC" and as more clearly and fully appears in the affidavit of ABRAHAM E. KLEIN, ESQ., hereto annexed, had notice of the proposed deregistration, and participated in said hearing by their agents "United" and "JAC", (b) plaintiffs' allegations respecting an alleged denial of equal protection scarcely reach the insufficient level of vague and conclusionary, (c) plaintiffs' lack of standing to challenge the constitutionality of the State statutes and regulations promulgated thereunder since they have not actually been harmed thereby inasmuch as they received notice of, and had an opportunity to be heard through their agents "United" and "JAC" in the proceeding which resulted in the deregistration of the apprenticeship program.

DEFENDANT'S MOTION TO DISMISS COMPLAINT 5.28.1975 63

2. To dismiss the action because the complaint fails to state a claim upon which relief can be granted, or in the alternative for a summary judgment for the defendant on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. The undersigned will rely on the affidavit of ABRAHAM E KLEIN, ~~Joan Cohen~~ Esq. hereto annexed. ~~as Exhibit "A"~~.

Dated: New York, N.Y.
May 28, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Office & P.O. Address
Two World Trade Center
New York, N.Y. 10047

DOMINICK J. TUMINARO
Assistant Attorney General

Notice of Motion

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STATE OF NEW YORK)
COUNTY OF NEW YORK)

AFFIDAVIT OF ABRAHAM E. KLEIN 64

Abraham E. Klein, being duly sworn, deposes and says:

1. I am a Supervising Attorney in the New York State Department of Labor, am familiar with the deregistration proceedings herein, and make this affidavit in support of defendant's motion to dismiss.

2. The Notice of Proposed Deregistration, dated June 17, 1974, was sent to the United Construction Contractors Association Inc., of which all of the above twelve plaintiffs were members, to Local 363, International Brotherhood of Teamsters and to the Joint Apprenticeship Committee.

3. Although not required by law or regulation, the Notice of Proposed Deregistration, dated June 17, 1974, was sent to the employer-contractors who were members of the United Construction Contractors Association Inc., including the twelve plaintiffs herein.

4. By letter dated June 20, 1974, M. George Turchin, Esq., as attorney for the United Construction Contractors Association Inc., requested a hearing.

5. By letter dated June 20, 1974, Sanford E. Pollack, Esq. requested a hearing on behalf of Local 363, International Brotherhood of Teamsters.

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6. The Notice of Hearing, dated October 17, 1974, was sent to the United Construction Contractors Association Inc., which all of the above twelve plaintiffs were members, to Local 363, International Brotherhood of Teamsters and to the Joint Apprenticeship Committee.

7. At the hearing, United Construction Contractors Association Inc. appeared by its attorney, N. George Turchin, Esq., Local 363, International Brotherhood of Teamsters appeared by its attorney, Sanford E. Pollack, Esq., and the Joint Apprenticeship Committee appeared by its attorney, Morris Weissberg, Esq.

8. Plaintiff Eugene Iovino, Inc. appeared and testified at one of the five hearings.

9. Each of the above twelve plaintiffs was a member of the United Construction Contractors Association Inc., and the United Construction Contractors Association Inc. by its president, Mr. Alan Picault, entered into a Master Apprenticeship Agreement with Local 363, International Brotherhood of Teamsters, as the Joint Apprenticeship Committee, and the said Mr. Picault had authority to bind any member of the association to the provisions of the Master Agreement.

10. Under subdivision 3 of Section 610 of the Labor Law and under the Master Apprenticeship Agreement, each apprentice was required to attend related classroom instruction for 144 hours a year.

11. The evidence at the hearing showed that over a period of twelve years not one of the 576 apprentices indentured under this program ever completed his related classroom instruction or training to permit him to become a journeyman electrician, and that none of the plaintiffs has ever produced a completely trained journeyman.

12. Every contractor of a "JAC" forms an integral part of the sponsor and is responsible for seeing that his apprentices are trained under the provisions of the Master Apprenticeship Agreement.

13. The evidence at the hearing showed that the program failed to meet the intent and purpose of Article 23 of the Labor Law to provide skilled craftsmen in a particular trade. For failure to meet the responsibilities under the Master Agreement, the program was deregistered.

S/
ABRAHAM E. KLEIN
SUPERVISING ATTORNEY

Sworn to before me this
29th day of May, 1975.

Notary Public State of New York
No. 60 8580325
Qualified in Westchester County
Term Expires March 30, 1976

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S I R S :

PLEASE TAKE NOTICE that upon the complaint herein, the order of this Court dated March 3, 1976, and upon all the proceedings heretofore had herein, the undersigned will move this Court, in Room 318, United States Court House, Foley Square, New York, New York on July 2, 1976 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein against defendant, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment dismissing the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction over the subject matter of the complaint, that complainant fails to state a claim upon which relief can be granted, and on the ground of res judicata in that the same operative matters of fact and law presented by the complaint herein was conclusively adjudicated in a suit before the New York State Supreme Court, Appellate Division, between the authorized representative of

plaintiffs and the defendant herein, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 24, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Louis L. Levine
By

DOMINICK J. TUMINARO
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, N.Y. 10047
Tel. (212) 488-7422

TO: N. GEORGE TURCHIN, ESQ.
MORRIS WEISSBERG, ESQ.
Attorneys for Plaintiffs
253 Broadway
New York, N.Y. 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPERT ELECTRIC, INC.; HENDRIX ELECTRIC, INC.; ARGANO ELECTRIC CORP.; ZIP ELECTRIC CO., INC.; EUGENE IOVINE, INC.; PHASE II ELECTRIC CORP.; TAP ELECTRICAL SERVICES AND CONTRACTING, INC.; RAYNOR ELECTRIC CORP.; RUSSELL H. VENSK, INC.; BISANTZ ELECTRIC CO., INC.; ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC.; and FIVE STAR ELECTRIC CORP.,	RLC 75 Civil 2433
Plaintiffs,	PLAINTIFFS' STATEMENT PURSUANT TO RULE 9(g)
-against-	
LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,	
Defendant.	

Pursuant to Rule 9(g) of the Rules of this Court, in opposition to defendant's motion for summary judgment, plaintiffs submit that the following disputed factual issues which are alleged in the complaint require a trial for determination thereof:

1. Pursuant to Sections 601.7(c)(4) and 601.8 of Regulations of the New York State Labor Department Governing the Registration of Apprenticeship Programs and Agreements, as amended by defendant on June 4, 1974, and pursuant to his determination, dated May 1, 1975, which deregistered the apprentice training program of United Construction Contractors Association, Inc., Local 363, International Brotherhood of

Teamsters, and their Joint Apprenticeship Committee ("United"; "Local 363"; "JAC"), from and after May 1, 1975 continuously to the date hereof the defendant disqualified each plaintiff for three years from employing registered apprentices; from making apprenticeship agreements with persons whom plaintiffs employ or wish to employ as apprentice electricians; and from registering with the New York State Labor Department an apprenticeship agreement and apprentice training program in their individual names as employers.

2. Among other things, defendant's aforesaid actions had the effect of making each plaintiff not qualified to bid for public contracts with Federal, New York State and New York City agencies, by making each plaintiff not qualified to employ registered apprentice electricians.

3. After May 1, 1975, each plaintiff applied to defendant to register an apprentice training program or agreement in his individual name as employer, but defendant took no action upon such application to date; and such inaction had the effect of denying such applications.

4. None of the plaintiffs committed any of the acts alleged against United, Local 363, JAC in defendant's notice of proposed deregistration addressed to them, in that none of the plaintiffs "failed to complete the training of apprentices so as to qualify as journeymen"; or "failed to pay prevailing wages and supplements"; or "employed unregistered

apprentices"; or "used apprentices in excess of the ratio provided in the apprenticeship agreements for the geographical area in which the work was performed".

5. None of the plaintiffs agreed to, authorized, ratified or participated in any of the acts alleged in defendant's notice of proposed deregistration, and that plaintiffs did not have actual or constructive knowledge of any such acts.

6. No plaintiff was a party to the administrative deregistration proceeding against United, Local 363, JAC, which defendant conducted. No plaintiff had any opportunity to participate as a party in such administrative proceeding, to be heard therein, to present evidence and to examine and cross-examine witnesses therein; and defendant's notice of hearing and his findings and determination did not refer to the plaintiffs or make any determination concerning them.

7. The defendant based his aforesaid notice of proposed deregistration upon complaints made to him by Local 3, International Brotherhood of Electrical Workers ("Local 3"), which is a rival labor union of Local 363.

8. The following employers, named in defendant's aforesaid notice of proposed deregistration, were never members of United:

Gottlieb Contracting Co., Inc.
Abetta Electric Service Corp.
V. C. Vitanza Sons

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Franco Electric Corp.
Brown Electric
Five J Electric Co.
Realty Power, Inc.
Electro Flow Installations
Pennsylvania Building Co.
Mansfield Contracting Co., Inc.

9. After they allegedly committed the violations charged against them in defendant's aforesaid notice of proposed deregistration, the following employers left United and joined an association of contractors which bargains collectively with Local 3, and whose members employ only members of Local 3:

Zip Electric
Al Master Electric
Roberts Electric
Volpe Electric
L. F. Electric

10. The defendant did not deregister or impose any discipline upon the following employers named in the aforesaid notice of proposed deregistration, who are now members of associations of contractors which bargain collectively with Local 3, and whose members employ only members of Local 3:

Gottlieb Contracting Co., Inc.
V. C. Vitanza Sons
Franco Electric Corp.
Mansfield Contracting Co., Inc.

11. For many years Local 3 and Local 363 have been and they are now rival labor unions.

12. The National Labor Relations Board has sustained

decisions by Administrative Law Judges Herzel E. Plaine (Exhibit 1, annexed), and Anne Schlezinger (Exhibit 2, annexed) that Local 3 committed unfair labor practices including violence against contractors destruction of property designed to eliminate the plaintiffs and other non Local 3 contractors from the electrical contracting industry in New York City by exerting pressure on Federal, State and New York City governmental officials within the New York metropolitan area not to deal with the plaintiffs, and not to award governmental contracts to the plaintiffs even when they are the lowest competitive bidders therefor, and to cancel such contracts after award thereof and during performance thereof, and to disqualify the plaintiffs from bidding thereon; and by preventing and hindering plaintiffs' performance of work thereunder by physical violence, threats of violence, damage to property, strikes, picketing, preventing delivery of materials and supplies to job sites, and other actions.

13. In his administrative proceeding in which he deregistered the apprentice training agreement of United, Local 363, JAC, the defendant was biased and prejudiced against the plaintiffs and in favor of Local 3, in that, among other things, the labor members of the Apprenticeship and Training Council, which acted as a board in hearing the charges against the petitioners, were all officials of AFL craft

unions, who were unalterably opposed to electricians and electricians' apprentices belonging to a Teamster local union, outside the AFL; and the employer members of that Council were contractors who had collective bargaining contracts with AFL craft unions, who openly showed their bias against contractors who employed electricians and apprentices who belonged to a Teamster union by their questions to witnesses and statements during the hearing.

14. At the administrative hearing upon defendant's notice of proposed deregistration, pursuant to subpoena duces tecum, the New York State Labor Department produced reports that its inspectors found 230 violations of apprenticeship Regulations and agreements by contractors who employ only members of Local 3 and who are members of associations of electrical contractors which have collective bargaining contracts with Local 3.

15. Such violations by such contractors have existed for many years without any action taken thereon by the New York State Labor Department to apply deregistration or other discipline or corrective action to the apprentice training program of Local 3 and the associations of electrical contractors which have collective bargaining contracts with Local 3.

16. Defendant's aforesaid actions have caused and will cause damages to each plaintiff consisting of loss of oppor-

tunity to bid for and to be awarded Federal, New York State and New York City governmental contracts for electrical work, and other damages including increased wage costs by requiring each plaintiff to pay the greater wage rates of journeymen electricians to apprentice electricians whom they employ.

New York, N.Y., June 30, 1976

N. GEORGE TURCHIN
MORRIS WEISSBERG
Attorneys for Plaintiff
253 Broadway
New York, N. Y. 10007

By
MORRIS WEISSBERG

DECISION OF APPELLATE DIVISION OF NEW YORK

SUPREME COURT IN "UNITED v. LEVINE"

In the Matter of UNITED CONSTRUCTION CONTRACTORS ASSOCIATION, INC., et al., Petitioners, v LOUIS L. LEVINE, as Industrial Commissioner, Respondent.

Third Department, June 3, 1976

Labor — deregistration of apprenticeship training program — In view of failure of petitioners to supervise apprentice training program, which had been registered with State Department of Labor, and to maintain established standards, Industrial Commissioner did not abuse his discretion in directing deregistration; substantial evidence demonstrates that program failed to achieve its fundamental purpose inasmuch as, since inception, no apprentice completed both on-job training and required hours of related classroom instruction — petitioners had no right to have deregistration proceeding dismissed under former regulation governing registration of apprentice programs (12 NYCRR 601.7 [c]) — record does not sustain claim that respondent discriminated against petitioners in cancellation of agreement.

1. In December of 1971, petitioners filed and registered a multi-employer apprentice training program agreement with the State Department of Labor. The agreement

provided for a term of apprenticeship with on-the-job training at specified wage rates, a specific amount of organized evening instruction, and the ratio of apprentices to journeymen on a job. After receiving complaints that petitioners were violating the terms of the agreement, the Department of Labor served them with a notice of proposed deregistration, and pursuant to the regulations then in effect (12 NYCRR 601.7 [c]), petitioners requested a hearing. After a panel unanimously recommended deregistration, respondent adopted the recommendation and ordered petitioners' apprenticeship training program deregistered. In view of the gross failure on petitioners' part to supervise the program and maintain the established standards, respondent did not abuse his discretion in directing deregistration. There is substantial evidence in the record demonstrating that the apprenticeship program failed to achieve its fundamental purpose inasmuch as, since the inception of the program, not a single apprentice completed both the on-the-job training and the required hours of related classroom instructions.

2. The administration determination to adopt the regulation governing the registration of apprenticeship programs and agreements (12 NYCRR 601.7 [c]) has a reasonable basis in law and is sustained. Petitioners had no right to have the deregistration proceeding determined under former section 601.7 (c), since there is no constitutional objection to applying a statute or rule having the effect of a statute regulating procedure to a proceeding initiated after its effective date, based on events occurring before its effective date. Section 601.7 (c) created no substantive rights; it provides only the procedure on deregistration.

3. The record does not sustain petitioners' claim that respondent discriminated against them in the cancellation of their agreement. The contention that respondent failed to take disciplinary action against competing contractors for alleged violations of similar apprenticeship programs is unsubstantiated.

PROCEEDING pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the Industrial Commissioner of the State of New York, which deregistered petitioners' apprenticeship training program.

N. George Turchin, Morris Weissberg and *Robert J. Krengel* for petitioners.

Louis J. Lefkowitz, Attorney-General (Thomas P. Zolezzi and *Ruth Kessler Toch* of counsel), for respondent.

REYNOLDS, J. On October 19, 1971, petitioners executed a master apprentice training program agreement which was thereafter and on December 1, 1971 filed with and registered by the Apprentice Training Section of the New York State Department of Labor. The agreement provided for a five-year term of apprenticeship in which apprentices were to be given on-the-job training and experience by participating employers at wage rates specified therein and "organized instruction designed to provide the apprentice with a knowledge in technical subjects related to his trade." The organized instruction

was to be provided in evening classes at Metropolitan Evening Trade School conducted by the Board of Education of the City of New York and the instruction was to be not less than 144 hours per year. The contract also provided the ratio of apprentices to journeyman on a job. After the Department of Labor received a complaint that petitioners were violating the terms of the apprenticeship agreement, and after respondent met with petitioners' representative concerning the alleged violation, and after investigation by the Department of Labor on June 17, 1974, respondent served petitioners with a notice of proposed deregistration on the ground petitioners had failed to provide the training for apprentices as required by the apprenticeship agreement, that some employers participating in the program failed to pay mandated wages or used apprentices in excess of the prescribed ratio and that petitioners had failed to correct the deficiencies although they had been aware of them since June, 1973. Pursuant to the provisions of the regulations of the Department of Labor Regulations governing the registration of apprenticeship programs and agreements then in effect (12 NYCRR 601.7 [c]), petitioners requested a hearing. Pursuant to section 601.9 of said regulations, a panel of Apprenticeship Council was designated to conduct the hearing. After lengthy hearings the panel of seven, composed of an equal number of representatives of employers and employee organizations and the chairman of the Apprenticeship and Training Council, unanimously recommended deregistration. Respondent adopted the panel's recommendation and ordered petitioners' apprenticeship training program deregistered. Petitioners commenced this proceeding pursuant to CPLR article 78 to review respondent's decision to deregister petitioners' apprenticeship training program. Special Term granted an order transferring the proceeding to this court for review and enjoined the enforcement of respondent's decision pending review.

We have examined all of petitioners' claims and points and find them to be without merit. Article 23 of the Labor Law grants broad power to the Industrial Commissioner to supervise apprenticeship agreements and to maintain the standards thereof and to adopt rules and regulations necessary for the effective administration of apprenticeship programs. Effective administration requires the authority to deregister and discontinue an apprenticeship program that fails to conform to established standards. Paragraph (i) of subdivision 1 of section

811 of the Labor Law empowered respondent to adopt regulation section 601.7 (c) (12 NYCRR 601.7 [c]) to provide for deregistration on proof of noncompliance with established standards. Involved is a specific application of a broad statutory grant of authority. The administrative determination to adopt regulation section 601.7 (c) has reasonable basis in law and must be sustained *(Matter of Howard v Wyman*, 28 NY2d 434). Petitioners have no constitutional right to have this deregistration proceeding determined under the provisions of former section 601.7 (c), which was superseded by amended section 601.7 (c), which became effective June 3, 1974. The amended section prescribing the deregistration procedure was not applied retroactively.

There is no constitutional objection to applying a statute or a rule having the effect of a statute regulating procedure to a proceeding initiated after its effective date based on events occurring before its effective date. *(Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443; *Simonson v International Bank*, 14 NY2d 281.) Section 601.7 (c) created no substantive rights. It provides only the procedure on deregistration. It amply assures all parties adequate notice and hearing. We find substantial evidence in the record to support respondent's decision that petitioners and members of the United Construction Contractors Association, Inc., who participated in petitioners' apprenticeship program failed to comply with the terms of the apprenticeship agreement and failed to maintain the established standards. The apprenticeship agreement obligated petitioners to provide apprentices with 144 hours of classroom related instructions per year. Petitioners' Joint Apprenticeship Committee registered and obtained a negotiated reduction in the number of hours of instruction to 108 hours per year, without the knowledge or consent of respondent. Classes for instructions originally met twice a week for two hours a class. Upon reduction, the classes met for instructions once a week for three hours.

After the secretary of the Joint Apprenticeship Committee represented that the apprentices would thereafter receive 144 hours of instructions a year, a survey in April, 1974 revealed that out of 258 registered apprentices on the program only 91 were receiving the required classroom instructions. The record also supports respondent's finding that employers in petitioners' apprenticeship training program were engaging more apprentices in relation to journeyman on the jobs. The pe-

titioners cannot disassociate themselves from the conduct of the employers participating in the apprenticeship program. Petitioners were obligated to supervise the apprenticeship program to assure the accomplishments of the aims and objects thereof. The record substantiates the findings that since the inception of the apprenticeship program in 1961, 574 apprentices were registered and not a single apprentice complete both on-the-job training and the required 720 hours of related classroom instructions. The program failed to achieve its fundamental purpose. The record does not sustain the petitioners' claim that respondent discriminated against petitioners in the cancellation of their agreement. Petitioners' claim that respondent failed to take disciplinary action against competing contractors for alleged violations of similar apprenticeship programs remains an unsubstantiated charge. In view of the gross failure on petitioners' part to supervise the program and to maintain the standards thereof, we cannot say respondent abused his discretion in directing deregistration (CPLR 7803, subd 3). The discipline imposed is not so disproportionate to the offenses in light of the circumstances as to be shocking to one's sense of fairness (*Matter of Butterfly & Green v Lomenzo*, 36 NY2d 250). Petitioners may apply for reactivation of the program after three years (12 NYCRR 601.8).

The determination should be confirmed and the petition should be dismissed and the preliminary injunction restraining respondent from canceling the registration of petitioners' apprenticeship training program should be vacated.

GREENBLOTT, J. P., MAIN and LARKIN, JJ., concur.

Determination confirmed, petition dismissed, and preliminary injunction vacated, with costs.

NIK-O-LOK COMPANY et al., Appellants, v HUGH L. CAREY, as Governor of the State of New York, et al., Respondents.

Third Department, June 3, 1976

Constitutional law — pay toilet facilities — section 399-a of General Business Law, prohibiting operation of pay toilet facilities on real property, is constitutional; plaintiffs do not occupy real property where they operate pay toilet facilities and, accordingly, lack standing to argue that they have been denied equal protection and that penalty language of statute is unconstitutionally vague — term "pay toilet facilities" is not so ambiguous that it cannot be determined what statute prohibits — statute is valid exercise of police power

PETITION IN "UNITED v. LEVINE" IN NEW YORK SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
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In the Matter of the Application of

UNITED CONSTRUCTION CONTRACTORS ASSOCIATION INC., AND GORDON CANIZIO, as President of Local #363, International Brotherhood of Teamsters, Joint Apprenticeship Committee,

Petitioners,

for a judgment pursuant to Article 78, CPLR,

-against-

LOUIS L. LEVINE, as Industrial Commissioner of the State of New York,

Respondent.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petition of the above-named Petitioners respectfully alleges:

1. United Construction Contractors Association, Inc., ("United"), is a corporation organized and existing under the laws of the State of New York, which conducts collective bargaining negotiations and makes collective bargaining agreements on behalf of its members with Local Union #363, International Brotherhood of Teamsters ("Local 363"), whose members include journeymen electricians and apprentice electricians.

2. Louis L. Levine is the Industrial Commissioner of the

State of New York, who is the head of the Department of Labor of the State of NewYork, which Department is empowered by sections 220(3)(e) and 811(d) of the Labor Law to register individuals as apprentices, and to register apprenticeship agreements between employers and apprentices, and between employers and labor unions.

3. United and Local 363 formed a Joint Apprenticeship Committee ("JAC"), which signed and filed in the New York State Labor Department on or about December 1, 1971, an apprenticeship agreement for the employment and training of apprentices in the trade of electrician (jobbing and alterations), a copy of which is annexed hereto as Exhibit "1" and made a part hereof.

4. Section 601.7(c) of "REGULATIONS GOVERNING THE REGISTRATION OF APPRENTICESHIP PROGRAMS AND AGREEMENTS", adopted by the Department of Labor, effective December 4, 1973, provided, in part:

> "(1) Where it appears that sufficient cause exists for deregistration, the Commissioner shall so notify the program registrant in writing. The notice shall be sent by registered or certified mail, with return receipt requested, state the shortcomings and/or violations and remedy required, and state that a determination of reasonable cause for for deregistration will be made unless corrective action is effected within 10 days."

5. On June 3, 1974, the respondent amended the above-quoted Regulation to read, in part:

> "(1) Where it appears that sufficient cause exists for deregistration, the Commissioner shall send a notice to the registrant by registered or certified mail, return receipt

requested, stating the following:

(i) The notice is sent pursuant to this section:

(ii) The ground or grounds on which it is proposed to deregister the apprenticeship training program; and

(iii) That the program will be deregistered unless, within 10 calendar days of the receipt of this notice, the registrant files with the Commissioner a written request for a hearing.

(2) If the registrant request a hearing the Commissioner shall convene a hearing and issue his determination in accordance with section 601.9 of this Part.

([illegible] such determination the Commissioner may [illegible] the registrant a reasonable time to achieve voluntary corrective action.***."

6. On or about June 17, 1974, the respondent caused to be served upon the petitioners, a notice of proposed deregistration of the aforesaid apprenticeship agreement, which alleged that petitioners' apprentice training program has not been conducted in conformity with Article 23 of the Labor Law and the regulations thereunder. A copy of the said notice is annexed hereto as Exhibit "2", and made a part hereof.

7. The said allegations are not true. The petitioners did not commit any of the acts alleged in the said notice of proposed deregistration.

8. Thereafter the respondent caused hearings to be conducted upon the allegations in the aforesaid notice of proposed deregistration, after which the respondent made a determination, dated May 1, 1975:

"that the apprenticeship Training program of the United Construction Contractors Association

> of Teamsters, Joint Apprenticeship Committee is hereby deregistered, effective immediately."

A copy of the said determination is annexed hereto as Exhibit "3" and made a part hereof.

9. The aforesaid regulations relating to involuntary deregistration of apprnticeship agreements are not authorized by section 11(f) of the Labor Law, which only empowers the respondent:

> "to terminate or cancel any apprenticeship agreements in accordance with the provisions of such agreements."

Petitioners' apprentice training agreement made no provision for termination or cancellation thereof. Consequently, respondent's aforesaid regulations, and his aforesaid proceedings thereunder, including his aforesaid notice of proposed deregisteration and his determination of deregistration of petitioners' apprentice training agreement were not authorized by statute, and they are invalid.

10. No statute authorized respondent to deregister apprentice training agreements against the will of the parties thereto, and no statute prescribed any standards for any such deregistration. Therefore, the respondent had no lawful power to adopt his aforesaid regulations, nor to deregister petitioners' apprentice training agreement thereunder.

11. In the absence of statutory authorization for involuntary deregistration of apprentice training agreements, the provisions of respondent's aforesaid regulations for involuntary deregistration of apprentice training agreements, and his deregistration of petitioners'

apprentice training agreement thereunder, impaired the obligation of the contract made by the said agreement, deprived the petitioners of their liberty and property without due process of law, and denied to them the equal protection of the laws, contrary to Article 1, sections 6 and 11 of the New York Constitution, and Article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, and it was unconstitutional and invalid.

12. Respondent's determination that petitioners are legally responsible for alleged violations of law and of apprentice training regulations by individual employers who are members of the petitioning contractors association, and by other individual employers who were not and are not members of the petitioners' contractors association, although there was no evidence that the petitioners authorized, ratified, or participated in such violations, unconstitutionally deprived the petitioners of their property without due process of law, and denied to them the equal protection of the laws, and it was unconstitutional and invalid.

13. The respondent's determination retroactively applied to alleged violations antedating June 3, 1974, his amendment of his regulations, effective June 3, 1974, which retroactively revoked petitioners' right under prior regulations to written notice and an opportunity to correct violations which allegedly occurred prior to such amendment, and thereby he unconstitutionally deprived the petitioners of property without due process of law,

and denied to them the equal protection of the laws. Consequently, such determination is unconstitutional and invalid.

14. There was no factual or legal basis for resppondent's findings and determination that the petitioners reduced from 144 hours to 108 hours per year the number of hours of classroom instruction of apprentices, and that petitioners failed to correct such reduction, because the petitioners had no power to conduct or to control the classroom instruction of apprentices; and, instead, section 812 of the Education Law provided that:

> "Related and supplemental instruction for apprentices *** shall be the responsibility of state and local boards responsible for vocational education."

15. Respondent's finding:

> "From the inception of the program in 1961 until 1973, not one of the 574 apprentices achieved completion of the program or certifiable journeyman status",

is contrary to the facts, and arbitrary, in that the evidence at the hearing established that in fact many apprentices completed the apprentices training program, both in on-the-job training in electrical work, and in educational courses of study conducted by the Board of Education of the City of New York.

16. Respondent's finding:

> "The sponsor not only failed to meet its obligations to provide related classroom instruction but by its own actions made it impossible for any apprentice to obtain the

> necessary 144 hours of related classroom instruction",

is contrary to the facts, arbitrary, and illegal, because the petitioners had no power to conduct or to control the attendance, courses of study, hours of study, and classroom instruction of apprentices; and, instead, section 812 of the Education Law provided that "state and local boards responsible for vocational education" shall be responsible for and shall provide educational courses of study to apprentices.

17. Respondent's finding:

> "The sponsor in a Joint Apprenticeship Committee consists of the union and each contractor having a collective bargaining agreement with said union. Therefore the acts of each participating contractor in an apprenticeship program is attributable to the sponsor",

is contrary to the facts, arbitrary, and illegal, because United Local 363, and JAC, had no knowledge of, and did not participate in, authorize or ratify any alleged violations of the apprentice training agreement or of apprentice training regulations by individual contractors who are members of United, and by other individual employers who are not and are not members of United.

18. Respondent's finding:

> "The sponsor failed to take any substantial corrective action with respect to violations of the Labor Law despite the fact that such violations were matters of public record",

is contrary to the facts, and arbitrary, because no employer who was a member of United after June 17, 1974 when respondent

served his notice of proposed deregistration committed any violation of the Labor Law; and after June 17, 1974, the petitioners could not take any corrective action with respect to alleged violations by employers who formerly were members and who ceased to be members before June 17, 1974 or who went out of business before June 17, 1974. Moreover, after respondent informed JAC that the number of hours of classroom instruction of apprentices should be 4 hours per week, the apprentices complied therewith by attending classroom instruction for 4 hours per week.

19. Respondent abused his discretion in imposing deregistration as the penalty, instead of imposing a lesser penalty by directing that corrective action shall be taken, as provided in section 601.7(c) of the regulations effective December 4, 1973, and as provided as a discretionary disposition in an amendment of said regulation on June 3, 1974.

20. In addition to the petitioners' apprentice training program, there are also apprentice training programs registered by respondent which were created by Local Union Nos. 3, New York City, and Local Union Nos. 25, Nassau and Suffolk Counties, affiliated with Interational Brotherhood of Electrical Workers ("Local 3"; "Local 25"), and contractors associations which employ only members of Locals 3 and 25, and which make collective bargaining contracts with Locals 3 and 25.

21. Locals 3 and 25 are rival labor unions to Local 363. Locals 3 and 25 dominate the field of new construction electrical

work, and Federal, State and City construction, and they actively seek to eliminate the members of Local 363 who are employed in alteration and repair electrical work, by committing acts of sabotage and violence, destroying the electrical work performed by contractors employing members of Local 363, picketing to compel governmental agencies not to give public contracts for alteration and repair electrical work to contractors who employ members of Local 363, and by complaints to governmental agencies that contractors who employ members of Local 363 violated statutes and regulations governing employment of mechanics and apprentices upon public contracts. The aforesaid charges and hearing were instigated by Local 3 and 25 and Locals 3 and 25 publicly acknowledged that the State Labor Department's action in this case came about through pressure from them that led to the deregistration.

22. Pursuant to subpeona duces tecum served by petitioners the Department of Labor produced at the administrative hearing upon the aforesaid allegations reports that its own inspectors found 230 violations of apprenticeship agreements and apprenticeship regulations by contractors who employ only members of Local 3, and who are members of associations of contractors which have collective bargaining contracts with Local 3.

23. Such violations by such contractors have existed for many years, without any action taken thereon by the Department of Labor of the State of New York to apply deregistration or other discipline

or corrective action to the apprentice training program of Local 3 and the associations of electrical contractors which have collective bargaining contracts with Local 3.

24. Moreover, several contractors whom respondent named in his notice of proposed deregistration as having allegedly violated an apprentice training agreement or regulations, or the Labor Law, ceased to be members of United, and ceased to employ members of Local 363, and, instead, they joined an association of contractors which has a collective bargaining contract with Local 3, and they employ only members of Local 3, and such contractors, including, among others, Mansfield Contracting Co., Inc.,; Gottlieb Contracting Co., Inc., and Franco Electric Corp., have not been disqualified from employing registered apprentices, or otherwise disciplined, and they continue to be eligible to bid for and to obtain Federal, New York State and New York City contracts for electrical work.

25. The respondent did not comply with a subpeona duces tecum issued by petitioners requiring the respondent to produce at the said administrative hearing respondent's records of inspections and reports of violations of Labor Law provisions and apprentice training regulations by contractors who have collective bargaining contracts with Locals 3 and 25. Instead, contrary to CPLR Sec. 2308(2), the hearing officer exceeded his lawful power by purporting to modify the said subpeona duces tecum so as not to require the respondent to produce such records and

reports at such administrative hearing, although CPLR Sec. 2308(2) provides that such modification may be made only by the Supreme Court.

26. The hearing officer erroneously excluded profferred evidence that Locals 3 and 25 induced apprentice electricians who were members of Local 363 to leave Local 363 and to join Local 3 or Local 25, and thereby reduced the number of Local 363 apprentices who completed the apprentice training program and became journeymen electricians.

27. The hearing officer erroneously excluded profferred evidence that Local 3's apprentice training program has no prescribed ratio of apprentices to jouneymen electricians, whereas respondent prescribed such a ratio for petitioners' apprentice training program.

28. Respondent based his determination that petitioner asked for a change in the number of hours of classroom instructions of apprentices from 4 hours to 3 hours weekly upon testimony that predecessor Local 819 asked for such change, without any evidence that the sponsor, namely, JAC, Local 363, United, authorized or ratified such actions.

29. By deregistering the apprentice training agreement of the petitioners, without deregistering or otherwise disciplining the apprentice training agreements made by Locals 3 and 25 with associations of contractors, the respondent

disqualified from bidding on public contracts the contractors who are members of United, without disqualifying or otherwise disciplining their competitors who employer members of Locals 3 and 25, thus leaving to such former competitors a monopoly of bidding for and obtaining public contracts for electrical work; and thereby the respondent discriminated arbitrarily and invidiously against the petitioners and against contractors who are members of United, and he denied to petitioners the equal protection of the laws, contrary to Article 1, section 11 of the Constitution of the State of New York, and section of the Fourteenth Amendment to the Constitution of the United States, and, consequently, such determination was unconstitutional and invalid.

30. Petitioners have sustained immediate irreparable harm by disqualification of contractors who are members of JAC, United, Local 363, from employing registered apprentices, in that thereby such contractors are made incapable of bidding for and obtaining public contracts for electrical work from Federal, New York State and New York City agencies; and for the less skilled work previously performed by apprentices whom they employed, the respondent's determination has the effect of requiring such contractors to pay the higher wage rates of a journeyman electrician instead of the lower wage rates of an apprentice electrician.

31. Petitioners have no adequate remedy at law.

WHEREFORE, petitioners pray for judgment pursuant to Article 78, CPLR:

1. Reviewing and annulling respondent's determination, dated May 1, 1975, which: (1) deregistered the apprentice training agreement of the petitioners; (2) cancelled the registration of apprentice electricians registered under petitioners' apprentice training agreement and (3) disqualified each contractor employer who is a member of United Construction Contractors Association, Inc., from employing registered apprentices.

2. Restraining and enjoining the respondent, preliminarily, pending the determination of this proceeding, and permanently: (1) from cancelling the registration of apprentices who are registered under petitioners' apprentice training agreement and; (2) from disqualifying each employer-member of United Construction Contractors Association, Inc., from employing registered apprentice electricians.

3. In the alternative, directing a trial of any factual triable issue raised by the pleadings and proofs of the parties.

4. For such other, further or different relief as may be just and proper.

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1 Copies Received

Date December 27, 1976

Firm Hon. Louis J. Lefkowitz

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